REPUBLIC OR EMPIRE?

An Argument

IN OPPOSITION TO THE ESTABLISHMENT OF AN AMERICAN COLONIAL SYSTEM

BY

JAMES W. STILLMAN

BOSTON
GEORGE H. ELLIS, PRINTER, 272 CONGRESS STREET
1900

REPUBLIC OR EMPIRE?

One of the various arguments which are advanced by the advocates and the supporters of the President's policy of territorial expansion is that the commercial interests of the United States imperatively demand that the markets of the old world should be thrown open to our surplus products. This is the principal ground upon which Senator Beveridge of Indiana, in his recent speech in the Senate, sought to justify the war which the Federal administration is now waging against the inhabitants of the Philippine Islands. As this speech is said correctly to represent the views of the President and of his coadjutors, it is worthy of more serious consideration than it would command were it merely an expression of the individual opinions of its author; and for that reason the writer of this article will inquire whether or not a colonial system can be inaugurated by the United States consistently with the fundamental principles upon which our Government was founded.

Conceding for the purpose of this discussion the truth of all that the Senator has said concerning the great advantages which would accrue to our people by creating an increased demand for their manufactures and other products among the inhabitants of our so-called "new possessions," the question as to how a colonial system can be established or maintained under our Constitution as it now reads must first be considered; for no legislation by Congress which is contrary to the provisions of, or is forbidden by, that instrument can be valid and binding upon our citizens. If, after a careful examination thereof, it should appear that such a system is authorized thereby, we may then decide whether or not it ought to be adopted; and if we should be convinced that colonies would be advantageous to us we may proceed to establish them. If, however, that system is contrary to the Constitution, the first step to be taken in

that direction must be to amend that instrument accordingly, if such an amendment can and will accomplish that result,— a question which will be considered in a subsequent part of this article.

It becomes necessary, therefore, to examine the nature of the Federal Government and to ascertain what are the powers which it may rightfully exercise. It is a fundamental principle of our political system that all sovereignty resides in and flows from the people and that no power can be rightfully exercised by any department of the Government which is not conferred upon it by the Constitution either expressly or by necessary implication. So important was this principle considered by the people of the United States that very soon after the Constitution was adopted Article X. of the Amendments thereto was submitted by Congress to the Legislatures of the several States and ratified by a sufficient number thereof to insure its adoption as a part of that instrument. That Article reads as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As the Government established by the Constitution is one of limited scope, we are thus led to inquire whether or not there is any provision thereof which authorizes Congress to establish or to maintain colonies or provinces in various parts of the world. Before examining the provision thereof by which this power is alleged to have been conferred upon that body it is necessary to call the attention of the reader to the preamble thereto which specifies the purposes for which that instrument was ordained and established, as all legislation by Congress in order to be valid must be in accordance with, and not repugnant to, those purposes. That preamble is in the following words:—

"We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves

and our posterity, do ordain and establish this Constitution for the United States of America."

It will be perceived that according to its preamble the Constitution was ordained and established "for the United States of America" and not for any other part of the habitable globe. How, then, can it be extended beyond our boundaries unless it be so amended as to allow that to be done, even if that be possible? And as the Government instituted by it rests upon the consent of the governed, having only such powers as they have granted thereto, how can any other people be made subject to it without their consent also? But even if this could be done consistently with the body of the Constitution, the question would arise whether or not a colonial system is consistent with the purposes thereof as specified in the preamble thereto. It certainly cannot be reasonably contended that to govern any people without their consent and against their protests is "to form a more perfect Union" or "to establish justice." Neither can it be truthfully said that to do so is "to insure domestic tranquillity," "to provide for the common defence" or "to promote the general welfare." "To secure the blessings of liberty to ourselves and our posterity" does not mean to secure those blessings to the people of other countries however desirable that may be; and still less does it justify us in depriving them of "the blessings of liberty." The purposes for which the Constitution was ordained and established, therefore, cannot be fulfilled by the establishment of a colonial system; and consequently, it is clearly unconstitutional; and for that reason, if for no other, the policy to which the President is now endeavoring to commit the citizens of the United States ought to be immediately abandoned.

But admitting for the purpose of this argument that a colonial system is not inconsistent with the preamble to the Constitution, let us next inquire whether or not there is any clause thereof which provides for or authorizes it. The words of that instrument which are usually referred to by those persons who contend that Congress possesses sovereign

power over the Territories are contained in Clause 2 of Section 3 of Article IV., which reads as follows:—

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

The first power therein conferred upon Congress is "*to dispose of* the territory or other property belonging to the United States." What do these words signify? When speaking of territory or of land which cannot be destroyed, they must mean to give away, to cede, to sell or to lease; and no other meaning can properly be attached to them. The second power therein granted to Congress is "to make all needful rules and regulations" respecting said territory or or other property. It is a well-established rule that in construing a constitutional provision or a statute its words must always have the same meaning which they had at the time when they were used therein. Applying that rule to the construction of this clause, we are compelled to conclude that it had reference only to the land then owned by the Federal Government and not to those political communities which are now called "Territories," because at that time there were no such political communities claimed to be under our jurisdiction; and therefore, the word "territory" could not then have had the additional meaning which since has been and now is ascribed to it by those persons who contend that the clause confers upon Congress the power of instituting territorial governments over, or of legislating for, the inhabitants of the public domain. If the members of the Constitutional Convention had intended to apply this word to such Territories as might thereafter be established, they certainly would have used it in the plural instead of in the singular number, thereby removing all doubt as to the meaning which they intended to convey. On this point the Supreme Court has expressed its opinion in the case of *United States* v. *Gratiot et al.*, 14 Peters, 526, 537, in which it said:—

"The term 'territory,' as here used, is merely descriptive of one kind of property and is equivalent to the word 'lands.'"

That the word "territory," as used in this clause means land only is made perfectly clear when the three following words "or other property" are considered, as they manifestly refer to a different kind of property; and no one will seriously contend that the people who resided on the public domain at the time when the Constitution was adopted were "property belonging to the United States"; for if they had been so, Congress would have had the power "to dispose of" them, which means to give them away, to sell them into slavery, to banish them or to exterminate them; and it is unreasonable to believe that such a power as this is was intended to be conferred by the Constitutional Convention upon Congress. So to construe the clause is equivalent to saying that all of those people were then neither more nor less than slaves owned by the Federal Government which was not the case; although there were a few slaves who were the private property of certain citizens of some of the States in the Union. A construction of a constitutional provision which is so manifestly absurd as this is cannot be the correct one. But even if the convention had intended to establish and could have established the institution of slavery on the public domain, the Constitution as it now reads does not recognize but actually prohibits property in human beings and abolishes every form of slavery and involuntary servitude within the United States or any place subject to their jurisdiction except as a punishment for crime whereof the party shall have been duly convicted.*

It is true that here is a provision for "needful rules and regulations"; but these words cannot apply to persons but are limited to "the territory or other property belonging to the United States"; and therefore, they cannot authorize either civil or criminal legislation for the inhabitants of the Territories. Rules and regulations respecting property cannot include laws for people; and all that Congress can rightfully do under this clause in reference to the public land is to

* Article XIII. of the Amendments.

provide for surveying, improving, cultivating or leasing it;* and these rules and regulations can have force only while this territory belongs to the United States. Whenever it is sold it ceases to be property belonging to the United States; it becomes property belonging to individuals. It ceases to be public property; it becomes private property; and Congress, whenever it sells this territory, parts with its jurisdiction over it.†

The territory is here referred to as property "belonging to" the United States; but that does not imply that it is necessarily *a part of* the United States unless it be within the boundaries of the States in the Union. This being true, that portion of the public domain which is without those boundaries constitutes no part of the nation but is merely its property; and all legislation by Congress relating to it must treat it only as such property; while all political jurisdiction over the people who reside on public land within the Union which has not been ceded to the Federal Government by the Legislatures of the States wherein it is situated, is vested in the Governments of those States, as will now be proven.

Having shown that this clause relates to property only, it does not justify the United States Government in assuming jurisdiction over the people who occupy the public land; for if it did, that jurisdiction would extend to *all* the land within as well as without the boundaries of the States which is the property of the United States. But it has been held by the Supreme Court in *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U. S., 525, that the Federal Government has no jurisdiction over people dwelling upon this land unless that has been expressly ceded to it by the Legislatures of the States in which it is located.‡ If the words "to make all needful rules and regulations respecting the territory or other property belonging to the United States" confer upon Congress the power to legislate for residents upon public land, these words must apply to *all* of this land wherever is

* For a further exposition of the meaning of these words see the opinion of Mr. Justice Campbell in the case of *Dred Scott* v. *Sandford*, 19 Howard, page 514.

† *Carroll* v. *Safford*, 3 Howard, 441, 460, 461.

‡ See also *The People* v. *Godfrey*, 17 Johnson, 225.

its location ; and as the Constitution and the laws of the United States made in pursuance thereof are the supreme law of the Union, the power of legislation thus conferred, if Congress should choose to exercise it, would supersede the jurisdiction of every State in which there is territory belonging to the United States over the people who occupy it. But according to the decision of the Supreme Court just cited, the mere ownership of land in the States by the Federal Government does not deprive these States of their jurisdiction over these people, thus establishing the proposition for which the writer contends,— that the authority of the United States over its citizens does not arise from the mere possession of the territory upon which they reside and that the words in question do not grant to Congress the power of legislation for the inhabitants of the Territories.

Additional light is thrown upon the meaning of the words already considered by the latter part of the clause, which reads as follows: "and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State." These words refer only to the conflicting claims of the Federal and the State Governments of the Union to certain land included in the cessions made by the treaty of peace between the United States and Great Britain and have no relation to political jurisdiction over the people who then resided or might thereafter reside upon that land. It is evident that the whole clause relates to property and to nothing else; and it was not intended to and does not grant to Congress authority to organize governments over, or to legislate for, the people of the Territories. How, then, can colonies be established or maintained by virtue of this constitutional provision?

That this construction of the clause under consideration is the correct one is made evident when the words thereof are contrasted with those of Clause 17 of Section 8 of Article I., which reads as follows: —

"The Congress shall have power to exercise exclusive legislation in all cases whatsoever, over such District (not ex-

ceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

It will be perceived that there is a marked difference between the phraseology of the first and that of the second of these two clauses. In one the Constitution speaks of "disposing of" and "making needful rules and regulations respecting property"; and in the other it uses the words "legislation" and "authority," both of which imply government for people. It is clear, therefore, that the meanings of these two provisions are not identical with, but are widely different from, each other and that the powers conferred by them are not the same but are separate and distinct. If the framers of the Constitution had intended that Congress should legislate for the Territories in the same manner in which it does for the District of Columbia and the other places mentioned in the last clause above quoted, they ought to and certainly would have used the same or similar words in both instances; and the fact that such words were not so used by them is conclusive evidence that they did not intend that Congress should exercise the same authority over the people of the Territories which it does over those of the above-mentioned District.

It may be said that if the consent of the governed is necessary under the Constitution, that principle was violated by compelling the citizens of the District of Columbia to submit to a government in which they were to have no voice. It is a sufficient answer to this suggestion to say that when the Constitution was ratified by the States of Virginia and Maryland out of which that District was composed, they did so with a perfect knowledge of the clause above quoted and that when they ceded to the United States the land which formerly constituted that District, those cessions were made with the full consent of the inhabitants thereof and that

their successors acquiesced and still acquiesce in the Government thus provided for them by voluntarily remaining in that District. So far as the people of the Territories likewise consent to be governed by the United States they suffer no injustice; but that fact does not prove that such a government is authorized by the Constitution; and as these people had no part in the formation of that instrument and as they have never ratified it they are not and cannot be bound by it if they should choose not to be so bound.

Although in the deeds executed by certain of the thirteen original States ceding territory to the Confederation, there were clauses granting to it the jurisdiction as well as the soil, this jurisdiction could be exercised only in accordance with such provisions as the Articles of Confederation contained or with such others as might be incorporated into the new Constitution; and the latter, as has been already shown, provides that Congress shall have the power to dispose of and to regulate the territory as property only and not to legislate for the inhabitants thereof either as citizens or as subjects; and in regard to the territory and the jurisdiction ceded to the United States by North Carolina on February 25, 1790, and by Georgia on April 24, 1802, and also that ceded thereto by treaties with France, Spain, Mexico and Russia, all of which occurred since the adoption of the Constitution, the same principle applies with equal force.*

The writer contends that the Federal Government has no rightful political jurisdiction or authority over any other persons than our own citizens, although he concedes that foreigners or aliens residing within our boundaries have no right to violate either the Federal or the State Constitutions or laws and can be rightfully punished for so doing.† He also contends that the Constitution and the laws of the United States made in pursuance thereof do not and cannot be made to extend over any persons who are not citizens of the United States and that such persons cannot be governed thereby without their free consent. If this contention be

* This paragraph is taken from the writer's article entitled "Territorial Sovereignty," which was published in *The Green Bag* for January, 1899, page 28.

† Wildenhus's Case, 120 U. S., 1.

true, it becomes necessary to determine whether or not the inhabitants of the Territories are now or can hereafter become such citizens. As to what constitutes a citizen of the United States it is manifest that no man who was born and has always resided in Arizona for instance, of parents who had always been inhabitants of that Territory, can be or become one until after the Territory shall have been admitted into the Union as a State, for the reason that a Territory is not a State and therefore not a part of the United States, in which, according to Article XIV. of the Amendments to the Constitution, all persons must be born or naturalized in order to be or to become such citizens. The Supreme Court has held in *Hooe* v. *Jamieson*, 166 U. S., 395, that a resident of the District of Columbia cannot bring an action against a citizen of a State in a Federal court because he is not himself a citizen of a State; and that is also true of a resident of a Territory.* For these reasons the writer contends that the Territories are not a part of the United States; and in support of that contention he will quote the following sentences from a speech delivered in the Senate on Thursday, February 2, 1899, by Senator Spooner of Wisconsin, who is one of the ablest constitutional lawyers in Congress:—

"The United States as a sovereignty derives its powers from the States and consists of the States. The Territories are not a part of the United States. They are not members of the Federal Union." †

It is true that Chief Justice Marshall, in *Loughborough* v. *Blake*, 5 Wheaton, 317, 319, referring to the words "United States," asserted that "It is the name given to our great republic which is composed of States and Territories"; but that was a mere dictum of his Honor; for the question as to the political *status* of the Territories was not before him for adjudication in that case; and the only one arising therein was whether or not Congress had authority to impose a direct tax on the District of Columbia in proportion

* *New Orleans* v. *Winter*, 1 Wheaton, 91.

† Congressional Record, 3d Session, Fifty-fifth Congress, page 1379.

to the census directed to be taken by the Constitution, which was decided in the affirmative.

That a resident of a Territory is not a citizen of the United States is made perfectly clear by the Article just referred to, the first section of which reads as follows: —

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Previous to the adoption of this Amendment there were no citizens of the United States as such but only those of the States; and this Amendment did not change the law in that respect except to create National, in addition to State, citizens and to secure to persons of African descent the political rights which previously had been denied to them; but it was not intended to and did not apply to persons residing outside of the boundaries of the forty-five States. If it was thereby designed to include the people of the Territories, why were not the words "or Territory" inserted after the word "State" in the first sentence thereof? According to Prof. C. C. Langdell, Dane professor of law in Harvard University, "The authors of the Fourteenth Amendment contemplated only States; for, if they had contemplated Territories as well, they certainly would have said 'citizens of the State or Territory in which they reside.'"* The words "and of the State wherein they reside" may mean that every citizen of the United States must also be a citizen of a State or that each citizen of a State must reside in that State in order to be a citizen thereof. The latter meaning is the one which was given to them by Mr. Justice Miller in his opinion in the *Slaughter-House Cases*, 16 Wallace, 36, 74; but whichever is their true mean-

* Harvard Law Review, Vol. XII., page 37[illegible].

ing there can be no national citizenship outside of the States composing the Union. It is true that the Article contains the words "and subject to the jurisdiction thereof"; but they are not words of enlargement but are those of limitation of the class born in the United States and were inserted therein so as to exclude children born of parents who were or might be subsequently residing here as representatives of other nations. On this point his Honor, on page 73, said:—

"The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign States born within the United States."

According to this decision these words do not include either the inhabitants of the District of Columbia or those of the Territories; and therefore, those inhabitants were not made citizens of the United States by this Amendment if they had not been so before its adoption.

It is true that a part of Mr. Justice Miller's construction of the words "and subject to the jurisdiction thereof" has been overruled by the court in the case of *United States* v. *Wong Kim Ark*, 169 U. S., 649, in which it was held that a person born in the United States of parents who are subjects of the Emperor of China but have a permanent domicile and residence in the United States and are there engaged in business and are not employed in any diplomatic or official capacity under the Government of China, is a citizen of the United States and of the State wherein he was born and may thereafter reside. But as this case arose in the State of California the question whether or not the people of the Territories are citizens of the United States was not and could not have been raised; and therefore, it was not and could not have been decided therein. It never has been held by the Supreme Court that a person born in a Territory is a citizen of the United States within the meaning of the Constitution independently of treaty stipulations or of statutory provisions or otherwise than in the broad sense of those words which will presently be indicated.

In regard to the words "any place subject to their jurisdiction," which occur in Article XIII. of the Amendments to the Constitution, the writer holds that they can refer only to the District of Columbia and to the other places mentioned in Clause 17 of Section 8, of Article I., whatever may have been the intention of the authors of that Amendment, as those places are the only ones within or without the States in which the United States has exclusive jurisdiction over persons. If these words can properly be applied to the Territories they must mean that these Territories are outside of the United States and therefore not a part thereof. If, however, the Territories *are* a part of the United States these words are entirely unnecessary, as the Amendment abolishes slavery and involuntary servitude in every part of the United States.

The statement above made that the people of the Territories are not citizens of the United States means that they are not so in the strict constitutional sense of those words, although in their international and common law sense those people *are* such citizens. As their allegiance has been transferred with their own consent from their former sovereign to this nation, they are now under its jurisdiction and are subject to the Governments established for them by Congress; and while they enjoy the right of regulating their own internal and domestic affairs, they have no voice in governing the United States except that of representation in the Federal House of Representatives by a Territorial Delegate. That they were not made full citizens of the United States by the mere cession thereto of the Territories in which they reside is evident from the fact that in each of the treaties of annexation, except the last two, there was an article which provided that the inhabitants of the ceded Territory should be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States. The treaty between the United States and Russia ceding Alaska to this country provided that the inhabitants thereof,

with the exception of uncivilized native tribes, should be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States; but it did not provide that they should be incorporated into the Union. The recent treaty of peace between the United States and Spain provided that the civil rights and the political *status* of the native inhabitants of the Territories thereby ceded to the United States should be determined by Congress. Thus it appears that the makers of these several treaties did not believe that the inhabitants of these Territories would become citizens of the United States in the strict constitutional sense of those words by the mere operation of the Constitution and without an express provision in each treaty to that effect. So that while according to international law they are American citizens, they are not and cannot become full citizens of the United States until after the Territories in which they reside shall have been admitted into the Union as States.*

Many other considerations might be presented in support of the construction which has been herein placed upon the above-quoted constitutional provisions; but these are amply sufficient in order to prove it to be the correct one. The writer is aware, however, that this construction is contrary to certain decisions which have been rendered by the Supreme Court; and although those decisions must be considered as a part of the fundamental law of the nation until they shall have been reversed by that tribunal or until they shall have been abrogated by a constitutional amendment, he nevertheless feels perfectly justified in dissenting from the conclusions of the court therein expressed. It is unnecessary to consider *all* of these decisions, as there is no material difference between them; and therefore, these observations will be confined to only three of them, those having been cited and approved by the court in most of its subsequent opinions relating to this question. The first is the one rendered by Chief Justice Marshall in *The American Insurance Company* v. *Canter*, 1 Peters, 511, 542, in which his Honor said: —

* *Boyd* v. *Thayer*, 143 U. S., 135, 137.

"In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution, which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.' Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern, may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

It will be noticed that his Honor here asserts that Florida continues to be governed as a Territory by virtue of the property clause of the Constitution; but he does not say that she had been rightfully so governed; nor does that appear to be his opinion; for he immediately proceeds to try to justify that government on other grounds. If this clause is sufficient for that purpose why was it necessary for him to mention any other source of the power under consideration? But being not satisfied on this point his Honor proceeds to argue the case still further and begins his next sentence with the word "perhaps," which is a strange one for a judge to use in a decision of an important question of constitutional law, as it indicates a doubt in his mind as to the truth of his own assertions; and the same observation applies with equal force to the word "may," which appears later in the same sentence. He also inserts the article "a," before the word "territory," thereby changing its meaning from land to a political community which is not the sense in which it was used in the Constitution, as has been already shown in this article. He then assumes that a Territory cannot acquire the means of self-government except by becoming a State,—an assumption which is entirely unwarrantable, as there is every reason to believe that its inhabitants are as competent to establish their own Government as were the

people of the thirteen original States to do likewise; and this was actually done by the people of California, Congress having neglected to provide a government for that Territory before it became a State. His next reason for thinking that the alleged authority of Congress over the Territories *may* exist is that as they are not within the jurisdiction of any particular State in the Union they must be within that of all of them combined under the Federal Government, which is assuming the truth of the very proposition which is in dispute. But if no State alone has any such jurisdiction, it is difficult to perceive how all of them together can possess it, as nothing, although multiplied by any number, remains nothing still. His Honor's last reason for thinking that Congress *may* possess this extraordinary power is that it "*may* be the inevitable consequence of the right to acquire territory." This is merely another assumption on his part and is totally wanting in proof; for although the United States like any other nation in the world has an undoubted right to obtain land by purchase or by cession from another country or from individuals, the right to govern the people who reside upon it can be derived only from their consent thereto. Thus it appears that of the three sources of the power to govern the Territories mentioned by the court it is unable to determine which is the true one; and it is uncertain as to all of them. Notwithstanding these facts the court asserts that "Whichever *may* be the source whence the power is derived, the possession of it is unquestioned,"— an assertion which was not then true and is not so to-day, as that always has been questioned by some persons and denied by others; and yet upon this weak decision nearly all the subsequent ones relating to this question have been based.

The next opinion of the Supreme Court which will be here considered is that delivered by Chief Justice Waite in *National Bank* v. *County of Yankton*, 101 U. S., 129, 132, from which the following sentences are quoted:—

"It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the

Constitution from which the power is derived, but that it exists has always been conceded. The Territories are but political subdivisions of the outlying dominion of the United States. All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. That body has full and complete legislative authority over the people of the Territories and all departments of the territorial governments. It may do for the Territories what the people under the Constitution may do for the States."

It will be perceived that at the time when this opinion was written his Honor thought that it was "too late" to doubt the existence of the power in question, thus implying that there had been a time when it was *not* too late to do so, which is equivalent to saying that a power may exist the source of which is doubtful. This assertion also implies that although of doubtful origin, such a power may become perfect by lapse of time and by the acquiescence of the people. If this doctrine be true, the Constitution is not a fixed and invariable rule of conduct for public officers but changes more or less as the years come and go,— a conclusion which the writer is unable to accept. His Honor's next assertion is that "There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded." This statement leads one to inquire, How can there be any difference of opinion as to which of several constitutional provisions is the one which confers upon a department of the Government a particular power if any one of them does so? To suggest doubts as to the meaning of the words of the Constitution is to reflect seriously upon the literary ability of its authors and also to impair the confidence of the people in it as a guide to all civil officers who are required to administer it. The next assertion in this opinion that the existence of the power under consideration "has always been conceded" is merely a repetition in other words of Chief Justice Marshall's statement on the same point; and therefore, it is unnecessary to repeat what

has already been said thereon. The proposition that "All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress" is true; but it applies only to the District of Columbia and to the other places mentioned in Clause 17 of Section 8 of Article I. of the Constitution, those being the only places in which exclusive jurisdiction over persons has been ceded by the States to the Federal Government. The affirmation that "Congress has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments" is merely the conclusion following from those which precede it; and as those are erroneous this is erroneous also. The other sentences above quoted, like the ones already examined, are mere assertions supported by no proof whatever; and so it is unnecessary to comment thereon. One of the most remarkable features of this opinion is the fact that from the beginning to the end thereof no allusion is made to the property clause or to any other provision of the Constitution nor is any previous decision of the court cited therein to support it. This fact appears to constitute an admission on the part of the court that the power in question, if it exist at all, does so outside and not inside the Constitution; and in that admission the writer concurs, although he denies that it exists anywhere.

The last opinion of the court which will be here commented upon is that delivered by Mr. Justice Bradley in *Mormon Church* v. *United States*, 136 U. S., 1, in which his Honor on page 42, said: —

"The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory and no power to govern it when acquired. The power to acquire

territory, other than the territory northwest of the Ohio River, (which belonged to the United States at the adoption of the Constitution,) is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty."

It is worthy of notice that in this opinion two sources of the power in question are alleged by the court to exist: first, the right to acquire territory, which it says is an incident of national sovereignty and second, the property clause of the Constitution. This fact suggests the inquiry, Why should there be two sources of a particular authority when one is sufficient? If Congress can govern the inhabitants of any territory by virtue of the right to acquire it no such constitutional provision is necessary. Whether or not this doctrine is true has already been considered in this article; and therefore, it is unnecessary to repeat our observations on that subject. The simple fact that the court relies upon this doctrine in order to support its opinion is conclusive evidence to prove that it does not really consider the property clause as granting to Congress the authority to establish governments over, or to legislate for, the people of the Territories, which is precisely what the writer contends.

All of the other decisions of the court on this question are equally inconclusive; and in none of them does it show how the jurisdiction of the United States can be made to extend beyond its limits without the consent and against the protests of the people of other countries who are sought to be subjected to our authority; and if Congress should be convinced that the court is in error in these decisions, it will be under no obligation whatever to exercise the power under consideration. It ought also to be remembered that the judgments of the Supreme Court, although entitled to respectful consideration by the other departments of the Government and by the people, are binding upon the inferior courts and upon the parties litigant; although they are not

obligatory upon Congress in any sense but like all other arguments are addressed to its discretion. Whenever a decision of that tribunal in the opinion of the legislative branch of the Government is subversive of the rights and the liberties of our citizens or is otherwise erroneous it is not only the right but also the imperative duty of that body to disregard it. Congress, therefore, is bound to consider the constitutionality of every measure which is brought before it; and it should be guided in its action thereon by its own judgment on that question.

One of the arguments which are advanced in favor of the exercise of the authority in dispute is that the controversy as to its existence has been settled by the long-established practice of the Government, that whether the decisions of the court thereon are right or wrong they have been accepted by both Congress and the people and that they cannot now be properly controverted. But when we remember the fact that the court has reversed its previous decisions in the legal tender, in the income tax and in other cases and when we also realize that this question will probably in the near future again be brought before that tribunal for further consideration and adjudication, there is no reason why the continued discussion thereof ought to be considered as either useless or unwise. The fact that during the past few years there has been a decided tendency on the part of the Government to depart from both the letter and the spirit of the Constitution and to enlarge the powers granted to it thereby is no justification for a further departure in the same direction. On the contrary, this fact affords the best of reasons why that tendency ought to be counteracted as much as that can possibly be done and why all public officers should be held to a strict obedience to the fundamental law of the nation from which alone all their powers are derived.

Before passing to the next branch of the argument, the writer will quote the opinion of one of the most distinguished Republican statesmen whom this country has produced in support of his contention that a colonial system is not provided for, or authorized by, the Constitution. He alludes to

William H. Seward of New York, who, in a speech in the Senate on a bill to admit New Mexico into the Union, on July 26, 1850, said: —

"It is a remarkable feature of the Constitution of the United States that its framers never contemplated Colonies or Provinces or Territories at all. On the other hand, they contemplated States only, nothing less than States, perfect States, equal States, as they are called here, sovereign States. . . . There is reason — there is sound political wisdom in this provision of the Constitution excluding Colonies, which are always subject to oppression and excluding Provinces which always tend to corrupt and enfeeble and ultimately to break down the parent State." *

The Supreme Court has also expressed its opinion on this subject in the case of *Dred Scott* v. *Sandford*, 19 Howard, 393, 446, 447, in which it said: —

"There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure, nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character."

Again, in the same case, the court said: —

"The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute

* Works, Vol. I., p. 122.

authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion."

Having thus shown that there is no warrant in the Constitution for the establishment or for the maintenance of colonies or of dependencies, the next question to be considered is whether or not there is any other ground upon which such legislation by Congress can be justified. As the advocates and the supporters of this new policy have utterly failed to indicate that there is any provision in the Constitution which authorizes it either expressly or by necessary implication, they have promulgated a new doctrine in American constitutional law which may be called "the theory of inherent sovereignty in the United States Government." This doctrine asserts that in addition to the express or implied powers of the Government conferred upon it by the Constitution it possesses certain other powers not depending upon grant but derived or resulting from the mere fact of its being a Government exercising governmental functions and that by virtue of this fact it can do whatever any other Government in the world can do. According to this doctrine the power to acquire territory is an attribute of national sovereignty possessed by all independent Governments, that as this power was not reserved by the States of the Union it exists only in the Federal Government without limitation and that in the right to acquire territory is found the right to govern its inhabitants either with or without their consent as Congress in its discretion may determine.

Upon this new theory of our Government the present administration and its supporters rely in order to justify the establishment and the maintenance of a colonial system by the United States. If this theory be the true one there is no limit to the jurisdiction of the Federal Government; and therefore, the specific enumeration of powers contained in the Constitution is entirely unnecessary; and the power of

Congress is as absolute as is that of the British Parliament; and there is no method by which its action can be restrained or defeated by the people. The mere statement of this doctrine carries its own refutation with it; and so it is unnecessary to occupy time or space in exposing its utter untenableness and absurdity. It is sufficient to call the attention of the reader to the fact that this Government was not formed or patterned after any European model; nor was it designed to exercise many even of those powers of sovereignty previously vested in the Governments of the several States which had combined to constitute the United States of America. It is true that we are a sovereign nation and according to international law the equal of any other nation on the face of the globe; but we are nevertheless a republic and not an empire or an absolute monarchy; and we have deliberately chosen to establish a Government of limited powers; and these cannot be increased in the least degree except by a constitutional amendment. And until such an amendment shall have been adopted by the people of the United States the Government thereof can exercise only those express or implied powers which the Constitution confers upon it, as has been already stated in a previous part of this article.

In support of this contention the writer will quote the following extracts from certain opinions of the Supreme Court. In the case of *United States* v. *Fisher*, 2 Cranch, 358, 396, Chief Justice Marshall, who delivered the opinion of the court, remarked: —

"It has been truly said that under a Constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised."

The same great judge, in the case of *McCulloch* v. *The State of Maryland*, 4 Wheaton, 316, 405, said: —

"This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the

people, found it necessary to urge. That principle is now universally admitted."

In the case of *Martin* v. *Hunter*, 1 Wheaton, 304, 326, Mr. Justice Story, speaking for the court, said: —

"The Government of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication."

In the case of *Briscoe* v. *The Bank of Kentucky*, 11 Peters, 257, 317, the court said: —

"The Federal Government is one of delegated powers. All powers not delegated to it, or inhibited to the States, are reserved to the States or to the people."

In delivering the opinion of the court in *Hepburn* v. *Griswold*, 8 Wallace, 603, 611, Chief Justice Chase said: —

"All the legislative power granted by the Constitution belongs to Congress; but it has no legislative power which is not thus granted."*

This being the law, it is difficult to perceive how the colonial policy of the administration can be in accordance therewith. It is one thing to enlarge the Union by the admission of new States thereinto; but it is another and quite a different thing to enter upon the government of colonies or of dependencies in various parts of the world. The Constitution provides in Section 3 of Article IV. that "New States may be admitted by the Congress into this Union"; but it nowhere provides that colonies or provinces may be established by that body; and therefore, applying the above-quoted decisions of the court to the matter under consideration, we must conclude that all legislation which is designed to accomplish that result is unconstitutional and consequently, null and void.

Another doctrine of quite recent origin will now be considered, as the friends of the administration rely upon it also in order to justify the government by us of our newly acquired Territories. Failing to find any warrant in the Constitution for this policy, they now contend that it can

* See also *United States* v. *Harris*, 106 U. S., 629, 635, 636.

be justified on the ground that the provisions of that instrument do not extend *ex proprio vigore* to the new Territories acquired by the United States and that therefore, Congress in legislating for them is not restrained thereby unless the Constitution should be extended to them by means of a statute.

Conceding that the first part of this proposition is true, the second, which is the conclusion sought to be drawn from it, by no means follows; for as the Constitution was made by and for the States only, it can have no force beyond the limits of the Union; and so it cannot be carried by Congress into other countries if it is not already there. This assertion is supported by the following sentences which are taken from a speech of Daniel Webster delivered in the Senate on February 24, 1849: —

"The Constitution is extended over the United States and over nothing else and can extend over nothing else. It cannot be extended over anything except over the old States and the new States that shall come in hereafter when they do come in." *

On the same point, Prof. Langdell, in the article from which an extract has just been quoted, on page 371 of the *Review*, says: —

"The Constitution of the United States as such does not extend beyond the limits of the States which are united by and under it."

As all the laws of the United States in order to be valid must be made in pursuance of the Constitution and must also be in harmony with and subordinate thereto, they cannot extend where it does not except by the free consent of the people who are therein sought to be brought under them. This doctrine, like those previously considered, is wholly untenable; and therefore, it affords no justification for the establishment of a colonial system by the United States.

Of course the writer freely concedes that the Constitution may be applied to the Territories by and with the consent

* Appendix to the Congressional Globe, Second Session, Thirtieth Congress, page 273.

of their inhabitants but not otherwise; for although the war and the treaty-making powers of the Government authorize the acquisition of territory, according to international law the allegiance of the people residing thereon cannot be transferred from their old sovereign to a new one unless they assent thereto.* This assertion does not mean that such assent must necessarily be expressed by a formal vote of those people; but it may be implied from their silence or from their conduct. All territory acquired by either of the methods just mentioned must be held and its inhabitants must be governed subject to our Constitution; but neither of these methods can increase or diminish the powers conferred by that instrument upon the Federal Government or upon any department thereof. As the Supreme Court has said, "Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own Government and not according to those of the Government ceding it." † Consequently, the United States in accepting sovereignty over these Territories must do so subject to all the restraints in the exercise thereof which the Constitution imposes upon it; and the guaranties as to civil and personal rights therein contained must be secured to all of their citizens. As two of the objects for which the Constitution was ordained and established, as specified in the preamble thereto, were "to establish justice" and "to secure the blessings of liberty to ourselves and our posterity," every provision thereof ought to be construed so as to insure those objects in every part of our domain; and it ought also to be enforced in all the Territories which are under our jurisdiction so far as its provisions are applicable thereto. The Supreme Court has held in *Murphy* v. *Ramsey*, 114 U. S., 15, 44, 45, that "The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of gov-

* Halleck's "International Law," Vol. II., pp. 473, 474, and 475; Phillimore's "Commentaries upon International Law," Vol. III., p. 571; Sir Sherston Baker's "First Steps in International Law," pp. 60, 61.

† *Pollard's Lessee* v. *Hagan*, 3 Howard, 212, 225.

ernment, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States." * This being the law, it ought to be as rigidly enforced in the new Territories as it always has been in the old ones; and if that be done, there can be no denial to the Hawaiians, the Porto Ricans or the Filipinos of any of the rights, privileges and immunities which are enjoyed by the people who reside in the other Territories of the United States.

If the views above expressed by the writer are well founded, the sovereignty which the Federal Government possesses over the people of the Territories is derived not from the Constitution but from their free consent, although that sovereignty must be exercised in accordance with, and not independently of, the provisions of that instrument. As the Porto Ricans are willing to be governed by the United States our Constitution extends over them so far as it can do so; and they are entitled to the same rights, privileges and immunities which are enjoyed by the residents of the other Territories who are likewise willing to be governed by us. But as the Filipinos do not consent to be subject to the United States our Constitution does not and cannot be made to extend to them until they shall have voluntarily acknowledged it to be binding upon them. So that in either case the sovereignty of the United States over the people of the ceded Territories is not and cannot be derived from the Government of Spain but only from those people themselves. Any other theory than this is inconsistent with the fundamental principles upon which our Government was founded.

Having thus shown that the Constitution as it now reads does not provide for colonies or for dependencies, let us next inquire whether or not it can be so amended as to insure that object. But before entering upon that discussion, it should be said that if the theory of inherent sovereignty

* Some of the other decisions of the court sustaining this proposition are those rendered in the following cases: *Webster* v. *Reid*, 11 Howard, 437; *Reynolds* v. *United States*, 98 U. S., 145; *American Publishing Company* v. *Fisher*, 166 U. S., 464; *Springville* v. *Thomas*, 166 U. S., 707; *Thompson* v. *Utah*, 170 U. S. 343.

in the United States Government already considered herein be true, no amendment to the Constitution is necessary in order to enable Congress to legislate upon this subject; for according to that doctrine it already possesses all the authority which is required for that purpose. But waiving that point the question arises, How can the power to govern the people of other countries without their consent and against their will be created by an amendment to our Constitution if it does not already exist? If such a government would be unjust, could it be made just in the manner proposed? Manifestly not. The people of the United States in adopting the Constitution established a Government for themselves only; and they have an undoubted right to delegate thereto such additional powers as in their judgment may be necessary to promote their own welfare and happiness; but they cannot delegate to it the authority to govern an unwilling people without a complete revolution in the nature of the Government itself. So that although such an amendment may be adopted, it would neither justify the new system nor be of any practical advantage to us in our efforts to administer it, as a strong military force would still be necessary for that purpose. Besides that, as the process of amending the Constitution is exceedingly slow and difficult, that proceeding would be entirely impracticable. What, then, ought to be done under existing circumstances? As our citizens have had no opportunity to make known their will by their ballots in regard to the policy of expansion or of imperialism only at any election heretofore held but have been required to vote upon other issues arising in the several States, that question pure and simple ought to be submitted to them as soon as that can be done so that they may decide whether or not the foreign policy of the administration shall receive their approval. If that question should be so submitted to them, the writer has sufficient confidence in their wisdom and in their patriotism to cause him to believe that they will condemn that policy and will reaffirm the truth of the Declaration of Independence by an overwhelming majority.